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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/698,415	11/03/2003	Aline Abergel	231191US26	2252
22850	7590	07/27/2007		
OBLON, SPIVAK, MCCLELLAND, MAIER & NEUSTADT, P.C. 1940 DUKE STREET ALEXANDRIA, VA 22314			EXAMINER WEEKS, GLORIA R	
			ART UNIT 3721	PAPER NUMBER
			NOTIFICATION DATE 07/27/2007	DELIVERY MODE ELECTRONIC

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/698,415  
Filing Date: November 03, 2003  
Appellant(s): ABERGEL, ALINE

**MAILED**  
**JUL 27 2007**  
**GROUP 3700**

Steven P. Weihrouch  
(Reg. No. 32,829)  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed March 23, 2007 appealing from the Office  
action mailed October 17, 2006.

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**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

2004/0003825	KELLY	1-2004
7,025,220	VERESPEJ ET AL.	4-2006
6,412,640	DESTANQUE ET AL.	7-2002
4,890,872	PARROTTA ET AL.	1-1990
4,491,389	COBURN, JR.	1-1985

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4,469,226 MATNEY 9-1984

WO 97/15910 GUIARD 1-1997

### **(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3, 8, 9 and 13-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kelly (US 2004/003825) in view of Coburn, Jr. (USPN 4,491,389) and Destanque et al. (USPN 6,412,640).

In reference to claims 1, 13 and 14, Kelly discloses a device for packaging a product comprising: a support (14) having a flat overall shape and having two faces, the support (14) further including at least one cavity (14a) that passes at least partially through the support (14) and opens on a first face of the two faces through a first opening, the cavity (14a) containing a cosmetic product (12); a lid (16) having a flat overall shape, wherein the lid (16) is articulated to the support (14); and wherein the support (14) and the lid (16) are articulated to each other by an arrangement comprising a sticker (24) adhesively bonded onto one of the faces of the lid (16) and onto one of the faces of the support (14).

Kelly does not disclose the sticker forming a mirror. Coburn teaches a sticker forming a mirror (12). While the device of Kelly includes a mirror on a surface opposite the surface

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bonded to the sticker (24), Destanque et al. teaches a packaging device including multiple surfaces forming a mirror, specifically an internal and external mirror surface. It would have been obvious to one having ordinary skill in the art at the time of the invention to modify the sticker of Kelly to form a mirror since Coburn states in column 1 lines 29-35 that forming a mirror on a sticker reduces cost and increases safety, and column 4 lines 60-64 Destanque et al. states that forming a mirror on multiple surfaces of packaging device allows a user the advantage of utilizing a mirror without opening the packaging device.

Regarding claims 2 and 3, Kelly discloses a packaging device wherein the lid (16) can rest on the support (14) so as to completely cover the first face of the support in which the first opening opens.

With respect to claims 8 and 9, Kelly discloses the sticker (24) being optionally formed of cellulose based, polymeric or metallic material. Coburn, Jr. teaches a reflective sticker formed from polyester thermoplastic (28) with a layer of metallized paint (30), forming a mirror. It would have been obvious to one having ordinary skill in the art at the time of the invention to further modify the device of Kelly to utilize the mirror material of Coburn, Jr. for the purpose of reducing cost. The use of such mirrors is also well known in the art of toys for the purpose of increasing safety by removing the need to use glass for reflective or mirror surfaces.

In reference to claim 15, Kelly discloses the cavity (14a) of the support (14) having a rectangular cross-section, as stated in paragraph 32 of Appellant's specification, it would have been obvious to one having ordinary skill in the art to form the cavity in a variety of cross-sections, including a circular cross-section.

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Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kelly (US 2004/003825) in view of Coburn, Jr. (USPN 4,491,389) and Destanque et al. (USPN 6,412,640) as applied to claims 1 above, and further in view of Guiard (WO 97/15910), Verespej et al. (USPN 7,025,220) and Matney (USPN 4,469,226).

In reference to claim 10, Kelly discloses a packaging device having a support with a cavity capable of being covered by a lid, wherein the lid is articulated to the support. Kelly does not disclose a removable cover for the cavity in addition to the lid. Guiard teaches a packaging device including a platform having a cavity (16) with a removable cover (26). While Guiard does not disclose a lid in addition to the removable cover (26), figure 2 of Matney and column 1 lines 29-47 of Verespej et al. state that it is well known in the art of packaging to provide a device with a tamper proof seal, in addition to a reclosable lid. Thus, it would have been obvious to one having ordinary skill in the art at the time of the invention to further modify the device of Kelly to include the removable cover of Guiard for the purpose of protecting the cosmetic product and ensuring a tamper proof product prior to authorized use.

Claims 11-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kelly (US 2004/003825) in view of Coburn, Jr. (USPN 4,491,389) and Destanque et al. (USPN 6,412,640) as applied to claims 1 above, and further in view of Parrotta et al. (USPN 4,890,872).

Regarding claims 11-12, Kelly does not disclose the specific dimensions or thickness of the lid and support. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to use a lid and support having a thickness of .5 mm-2 mm, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. While Kelly

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teaches a support thickness deep enough to contain an amount of product for multiple uses, Parrotta et al. teaches that it is well known to provide a support thickness that is significantly smaller for the purpose providing only a sample of a product.

Claims 7, 16, 18 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kelly (US 2004/003825) in view of Guiard (WO 97/15910) and Parrotta et al. (USPN 4,890,872).

In reference to claims 16, 18 and 33, Kelly discloses a device for packaging a product comprising: a flat support (14) including at least one cavity (14a) that passes at least partially through the support (14) and opens on a first face of the support (14) through a first opening, and wherein the cavity (14a) contains a cosmetic product (12); a flat lid (16) articulated to the support (14) by a thermoplastic and/or metallic sticker (24) adhesively bonded (page 2 paragraph 21) onto one of the faces of the lid (16) and onto one of the faces of the support. Kelly does not disclose the at least one cavity having a first and second opening.

Guiard teaches a packaging device having a support (11) including a cavity containing a cosmetic product (18, 20) that passes through a first and second face of the support, wherein a first adhesive sheet closes off the cavity on the first face of the support (11) and a second adhesive sheet closes off the cavity on the second face of the support (11). It would have been obvious to one having ordinary skill in the art at the time of the invention to modify the support of Kelly to include a second opening closed by the adhesive sheet, since Guiard teaches that such a modification allows the product to be secured to the support.

While one could justifiably define the cosmetic product of Guiard as the combination of the cosmetic composition and the tray in which the composition is contained, Parrotta et al. teaches that its is also known in the art of packaging to apply the cosmetic composition in a cavity (22) onto a adhesive sheet (34) without the use of additional retaining structure.

Regarding claim 7, Kelly does not disclose printed matter on the adhesive sheet that articulates the lid to the support. Appellant did not properly challenge the "Official Notice" taken by the Examiner in the office action mailed on October 17, 2006. In general, a challenge, to be proper, must contain adequate information or argument so that on its face it creates a reasonable doubt regarding the circumstances justifying the "Official Notice". As Appellant failed to properly challenge the "Official Notice" during examination, the Appellant's right to challenge the Official Notice is waived. Therefore, the well known in the art statement, with respect to an adhesive label with a printed design to the outside surface of a package for the purpose of decoration or disclosing the contents of the package, is taken to be Appellant admitted prior art.

Claims 4-6 and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kelly (US 2004/003825) in view of Guiard (WO 97/15910) and Parrotta et al. (USPN 4,890,872) as applied to claim 16 above, and further in view of Coburn, Jr. (USPN 4,491,389).

With respect to claims 4-6, Kelly discloses the sticker (24) being optionally formed of cellulose based, polymeric or metallic material. Coburn, Jr. teaches a reflective sticker formed from polyester thermoplastic (28) with a layer of aluminum paint (30), forming a mirror. It would have obvious to one having ordinary skill in the art at the time of the invention to further modify the device of Kelly to utilize the mirror material of Coburn, Jr. for the purpose of



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reducing cost. The use of such mirrors is also well known in the art of toys for the purpose of increasing safety by removing the need to use glass for reflective or mirror surfaces.

In reference to claims 20, Kelly further discloses a mirror (22) on a face of the lid (16), but does not disclose the mirror being formed from a sticker. Coburn teaches a sticker forming a mirror (12). It would have been obvious to one having ordinary skill in the art at the time of the invention to replace the mirror of Kelly sticker mirror of Coburn, since Coburn states in column 1 lines 29-35 that forming a mirror from a sticker reduces cost and increases safety.

Claims 30-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kelly (US 2004/003825) in view of Guiard (WO 97/15910), Parrotta et al. (USPN 4,890,872) and Coburn, Jr. (USPN 4,491,389) as applied to claim 29 above, and further in view of Verespej et al. (USPN 7,025,220) and Matney (USPN 4,469,226).

Regarding claims 30 and 31, the modified apparatus of Kelly discloses the product contained in the cavity in contact with the adhesive sheet, but does not disclose the packaging device including a removable cover over the first opening. Guiard teaches a packaging device including a platform having a cavity (16) with a removable cover (26). While Guiard does not disclose a lid in addition to the removable cover (26), figure 2 of Matney and column 1 lines 29-47 of Verespej et al. state that it is well known in the art of packaging to provide a device with a tamper proof seal, in addition to a reclosable lid. Thus, it would have been obvious to one having ordinary skill in the art at the time of the invention to further modify the device of Kelly to include the removable cover of Guiard for the purpose of protecting the cosmetic product and ensuring a tamper proof product prior to authorized use.

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Regarding claim 32, Kelly does not disclose the specific dimensions or thickness of the lid and support. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to use a lid and support having a thickness of .5 mm-2 mm, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. While Kelly teaches a support thickness deep enough to contain an amount of product for multiple uses, Parrotta et al. teaches that it is well known to provide a support thickness that is significantly smaller for the purpose providing only a sample of a product.

#### **(10) Response to Argument**

##### **I. Examiner's interpretation of independent claim 1**

Claim 1 recites:

A device for packaging a product comprising: a support having a flat overall shape and having two faces, said support further including at least one cavity that passes at least partially through the support and which opens on a first face of said two faces through a first opening, and wherein said cavity contains a product;  
a lid having a flat overall shape, and wherein said lid is articulated to the support; and wherein the support and the lid are articulated to each other by an arrangement comprising a sticker forming a mirror adhesively bonded onto a face of the lid and onto one of the faces of the support.

As Appellant's invention is drawn to a product, Appellant's invention is defined by the claimed limitations, which structurally define the product.

The first structural limitation of Appellant's invention is flat support defined by two faces, such that one of the faces has a recess extending from a cavity. The recess can extend either from the first face of the support to the second face of the support, or extend at a depth less than the depth defined by the first and second faces of the support. The cavity is further described to enclose a product.

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The second structural limitation is a flat lid that is connected to the support as defined above.

The third structural limitation defines how the lid is connected to the support. While Appellant claims the lid to be connected to the support by a mirror sticker that is adhesively bonded to both the support and the lid, the connection between the support and the lid is not limited to a mirror sticker. The phrase “an arrangement comprising” is found to require, at the least, a mirror sticker to articulate the support to the lid. The phrase “mirror sticker” is broadly interpreted to be a sheet having a surface having an adhesive agent, as well as a reflective surface<sup>1</sup>.

**II. The rejection of claim 1 under 35 U.S.C. 103(a) as being unpatentable over Kelly (US 2004/003825) in view of Coburn, Jr. (USPN 4,491,389) and Destanque et al. (USPN 6,412,640) is deemed proper.**

Appellant’s first argument is whether Kelly in view of Coburn, Jr. and Destanque et al. disclose or render obvious a lid that is articulated to a support by a sticker forming a mirror.

As stated by Appellant, Kelly is directed to a cosmetic case having a support 14 articulated to a lid 16 by an arrangement 24, wherein a surface of the arrangement 24 has an adhesive backing which allows the arrangement to be bonded to the support 14 and the lid 16.<sup>2</sup> The cosmetic case of Kelly further discloses a mirror, however, the mirror is adhesively bonded only to the lid of the cosmetic case, rather than both the lid and support as claimed in Appellant’s invention. Also, Kelly fails to disclose the composition of the mirror outside of its reflective face.

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<sup>1</sup> stick·er (st'k"...) *n.* 1. One that sticks, as a gummed or adhesive label or patch; American Heritage Dictionary

<sup>2</sup> Kelly – page 2 paragraph 21

Coburn, Jr. is relied upon for its disclosure of a cosmetic case having a mirror bonded to a cosmetic case, wherein the mirror is in the form of a sticker. Figure 2 of Coburn, Jr. illustrates the layering of a metallic sticker 30, which acts as a mirror, onto a layer of plastic 28, a layer of foam 26, and subsequently the surface of the lid. While there are materials that lie between the adhesive surface of the mirror sticker 30 and the surface of the lid, the mirror of Coburn, Jr. is nonetheless a label having an adhesive surface and a reflective surface. Thus, the teaching of Coburn, Jr. provides motivation to one of ordinary skill in the art to modify the mirror of Kelly on the surface of the lid, with an inexpensive mirror sticker.

The modified cosmetic case of Kelly in view of Coburn, Jr. now discloses a sticker articulating a first surface of a support to a first surface of a lid, and a mirror sticker positioned on a second surface of the lid, specifically an inner surface of the lid

Destanque et al. teaches a cosmetic case having a support and a lid, wherein a mirror is positioned on inner surface of the lid, as well as outer surfaces of the lid and support<sup>3</sup> for the purpose of allowing one to observe application of the cosmetic case contents when the lid is in an open position or in a closed position. Therefore, Examiner finds that it would have been obvious to one having ordinary skill in the art at the time of the invention to further modify the cosmetic case of Kelly to provide a mirror sticker, since Coburn, Jr. has taught stickers to be an inexpensive means of providing reflective surfaces, to an inner surface of the lid of the cosmetic case, as well as to the outer surface of the lid and support, as suggested by Destanque et al. As the outermost surfaces of the cosmetic case of Kelly is in the form of a single sticker that

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<sup>3</sup> Destanque et al. - column 4 lines 60-64; figure 4

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articulates the lid to the support, the modified dual mirrored surface cosmetic case of Kelly would disclose the cosmetic case of Appellant's invention as claimed.

### **III. Examiner's interpretation of independent claim 16**

Claim 16 recites:

A device for packaging a product comprising: a support having two faces, said support including through said support and which opens on a first face of said two faces through a first opening, wherein the cavity opens on a second side of said two faces through a second opening, and wherein said cavity contains a product having a first side adjacent said first opening and a second side adjacent said second opening;  
a lid, wherein said lid is articulated to the support; and  
wherein the support and the lid are articulated to each other by an arrangement comprising an adhesive sheet fixed onto one face of the lid and onto one of the faces of the support, wherein the adhesive sheet closes off said second opening of the cavity with a portion of said adhesive sheet which covers said second opening directly facing said second side of said product contained in said cavity.

As Appellant's invention is drawn to a product, Appellant's invention is defined by the claimed limitations, which structurally define the product.

The first structural limitation of Appellant's invention is support defined by two faces, and a recess that connects the two faces of the support, thereby creating a first opening in one of the two faces of the support, and a second opening on a second face of the two faces of the support.

The second limitation of the Appellant's claimed device, is a product within the cavity, wherein positioned adjacent both the first opening of the support and the second opening of the support. The phrase "adjacent to" is broadly interpreted to mean near or close to, not necessarily flush with or even to.<sup>4</sup>

The third structural limitation is a lid that is connected to the support as defined above.

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<sup>4</sup> American Heritage Dictionary

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The fourth structural limitation is an arrangement by which through which the lid is connected to the support. While Appellant claims the arrangement to include an adhesive sheet, the phrase “an arrangement comprising” is found to require, at the least, an adhesive sheet to articulate the support to the lid.

**IV. The rejection of claim 16 under 35 U.S.C. 103(a) as being unpatentable over Kelly (US 2004/003825) in view of Guiard (WO 97/15910) and Parrotta et al. (USPN 4,890,872) is deemed proper.**

In response to Appellant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.<sup>5</sup> In this case, both Kelly and Guiard disclose cosmetic cases including supports that have a cavity for the purpose of supporting a cosmetic product. The cosmetic case of Kelly has a cavity that extends partially through the support, such that a product is secured to the support by the bottom of the cavity, which is integrally formed with the support. On the other hand, Guiard discloses an alternative support for a cosmetic product, in which the support includes a cavity that passes completely through the support, wherein a cosmetic product positioned within the cavity is secured to the support by an adhesive sheet that is secured to a surface of the support across an opening of the cavity in the surface of the support.

Both Kelly and Guiard disclose cosmetic devices that solve the problem of supporting a cosmetic product, each having advantages over the other. Specifically in the case of Guiard, the

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<sup>5</sup> See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

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cosmetic product is secured to the support through both a press fit<sup>6</sup> and adhesive bonding of the sheet 22

Appellant has also argued that the combination of Kelly and Guiard fails to disclose the direct covering of the second opening directly facing the second side of the product, since Guiard teaches the product supported in a pan within the cavity of the support. Examiner finds the limitation of “a product having a first side and a second side” to be met by the pan 18 of cosmetic material 20. Both the pan and material as a unit define the product of Appellant’s invention. This interpretation is supported by figure 2 of Guiard, which illustrates the pan 18 and the material 20 as a single unit, separable from the support 12 of the cosmetic case 10. Therefore, Examiner maintains the assessment that the second opening of the cavity is covered “directly” by an adhesive sheet.

Moreover, Examiner maintains that Parrotta teaches an alternative cosmetic case having a support 20, 26, 28, 36, 38 including an opening 22, wherein a product 40 is contained with the opening and directly supported on a sheet 30 bonded to the support 20, 26, 28, 36, 38, such that no structure lies between the panel 30, the opening 22 and the product 40. Thus, Examiner finds that it is well known in the art at the time of the invention was made to seal a cavity of a support with an adhesive sheet.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner’s answer.

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<sup>6</sup> Guiard - figure 2


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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Gloria R. Weeks/

Conferees:

Louis Huynh 

Stephen Garbe 